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Supreme Court of the United States

OCTOBER TERM, 1949.

No. 291.

EMIL HANSEN, PETITIONER,

VS.

ST. JOSEPH FUEL OIL AND MANUFACTURING COMPANY, CLAUDE STEVENSON AND HARVEY HOYT, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Petitioner prays certiorari to review a judgment of the Court of Appeals for the Eighth Circuit entered May 17, 1950.

Opinion Below.

The Court of Appeals opinion is reported in 181 F. 2d 880.

Federal Jurisdiction.

Petitioner, a farmer, and a citizen and resident of Iowa, instituted this suit on April 28, 1948 (R. 1), in the

St. Joseph Division of the United States District Court for the Western District of Missouri against the St. Joseph Fuel Oil and Manufacturing Company, Claude Stevenson and Harvey Hoyt, citizens and residents of Missouri, residing at St. Joseph, Missouri, praying damages in two counts, aggregating $60,500. From an adverse judgment (R. 153) entered on September 24, 1948, as the result of a jury trial in defendants' home town, after unsuccessfully moving for a new trial duly and timely filed October 2, 1948, and overruled May 19, 1949 (R. 157), petitioner duly and timely appealed to the said Court of Appeals (R. 158).

Jurisdiction of Supreme Court.

The judgment below was entered May 17, 1950 (R. 176), affirming the said District Court's judgment entered September 24, 1948 (R. 153). Petition for rehearing filed May 31, 1950 (R. 192), was denied without any opinion or reason on June 13, 1950. Mandate by agreement of parties duly filed was stayed pending filing of this petition for certiorari until September 11, 1950 (R. 193). Jurisdiction of this Court is invoked under Title 28, U. S. C., Sections 1254 and 2101 (c) of the new Judicial Code, effective September 1, 1948.

Summary of Matter Involved.

Petitioner, Emil Hansen, plaintiff, a farmer living near Portsmouth, Iowa (R. 51), alleged in his complaint for damages and proved that on November 6, 1947, about 10:30 A. M., he was driving from his farm near Portsmouth, Iowa, with his wife in an Oldsmobile automobile on State Highway No. 169 to visit his son living at Appleton City, Missouri, and while moving south on said Highway on the concrete paved portion of the west side thereof designated and marked for southbound vehicles and traffic, near

Smithville in Clay County, Missouri, a large oil transport truck, 33 feet in length and loaded with 2,950 gallons of fuel oil, the truck and load weighing 40,000 pounds (R. 101) and operated by defendants and respondents in a northerly direction on the east half of said highway in the northbound lane thereof negligently on a descending 5 per cent grade (R. 14) on a double hill with an "S" curve suddenly turned over into the southbound lane of travel and immediately collided head on with Hansen's automobile (R. 55) then moving southward in his lane at a speed of about 40 m. p. h. killing his wife and seriously injuring Hansen and damaging his automobile (R. 9).

Defendants' and respondents' claim and evidence at the trial was that while descending moving northward in the northbound lane of travel on the first hill with a 5 per cent descending grade at a speed of about 40 miles per hour the brakes on their oil transport refused to work or "went out" and being without brakes, and the transport gaining speed, and running away with no control of speed, in order to avoid a collision with a northbound truck loaded high with fence posts and proceeding ahead northward in the northbound lane of travel, the oil transport truck while on the curve of the second hill with a 5 per cent down grade, was suddenly when about 4 feet behind the post truck turned out onto the west side of the pavement into the southbound or Hansen lane of travel where it near the bottom of the hill collided headon with the Hansen automobile (R. 80, 107, 108), further claiming in short that Hansen was guilty of contributory negligence in not getting out and keeping out of the way of the runaway oil transport truck (R. 4, 5) notwithstanding the motor vehicles were approaching each other at a combined speed of around 100 miles per hour leaving at most only seconds before contact. No evidence

was offered at the trial as to what caused the brakes on the oil transport to not operate or that the alleged emergency claimed was not due to the negligence of the defendants to keep the brakes in a proper state of repair.

In submitting the case to the jury the trial judge refused ten separate written requests, two of which were peremptory and the remaining eight on the submission to the jury, tendered to the judge before the oral charge at the close of all the evidence, by the plaintiff and petitioner, allowing exceptions thereto (R. 142 to 150) and proceeded to orally charge the jury. The Court of Appeals considered the two peremptory requests but refused to consider the remaining eight requests.

The trial judge as the Court of Appeals opinion shows (R. 172) in "so many instances" in his oral charge (R. 134 to 142) so confused the words "plaintiff and defendants" in referring to the parties that had the trial judge "refused to correct the resulting confusion at the request of either of the parties, a verdict against the objecting party could not have been permitted to stand." Petitioner contends the alleged correction (R. 151), which at most pertained only to degree of care, was insufficient and only tended to more confuse, and prevented a fair trial to petitioner of at least a worthy, meritorious cause of action, if not one entitling petitioner to a directed verdict on defendants' negligence. There were also other errors in the trial judge's oral charge, the principal one of which was refusing to instruct the jury that the defendants had to show or establish that the emergency claimed by defendants with respect to the brakes on the oil transport not working or "going out" was not the result of negligence on the part of the defendants in order to claim an emergency, which is the settled law of Missouri, and was

invoked by the petitioner in his said refused requests (R. 147, 148, 149).

Reason Given for Refusal to Consider.

The Court of Appeals refused to consider the trial Judge's refusal of petitioner's said 8 requests of the 10 requested (R. 175) for the reason that in taking his objections or exceptions he did not "direct the attention of the trial Court specifically to the alleged points of conflict between the Court's charge and the law as stated in appellant's requests, further stating "neither this Court nor the trial Court is under the duty of assuming the burden of comparison and analysis of the charge given and the instructions requested which appellant attempts to place upon them" (R. 175).

What Record Shows As to Exceptions.

The record shows at the conclusion of the judge's oral charge the following with exceptions occurred (R. 142 to 150):

> "The Court: Gentlemen, what exceptions do you have to the Court's charge?
>
> Mr. Miller: May it please your Honor, on behalf of the plaintiff I take it the Court will allow us exceptions to such of the charges as we have heretofore requested of your Honor, insofar as they are in conflict with what your charge has been to the jury.
>
> The Court: Those instructions have been marked 'refused' and will be deposited with the clerk.
>
> Mr. Miller: I also except to the reference of the Court that in the death of Mrs. Hansen the jury may not consider loss of companionship.
>
> The Court: All right. That was requested by the defendant, I believe?
>
> Mr. Kaufmann: That is right.

The Court: How about you, Mr. Garvey?

* * * * * * *

Mr. Kaufmann: Except this, your Honor, am I correct if you have marked any of ours 'refused' our exception will be saved likewise?

The Court: Well, now gentlemen, for the sake of this record, you know I doubt very much if you can preserve any of your exceptions unless you dictate them into this record. That is the rule. You have to save exceptions at the close and dictate them into the record before the Court of Appeals will consider them. *You may say that the Court erred in refusing to give instructions so and so, or erred in giving instructions asked by the plaintiff* (Italics ours).

Mr. Miller: I thought they were trying to simplify things.

The Court: I know, but when you get into the sections—

Mr. Miller: If you will let me have mine—

The Court: Isn't that true?

Mr. Miller: I couldn't say; it may be. The last decision may have changed it.

Mr. Garvey: I believe you saved your exceptions.

Mr. Miller: We have always practiced the way I have done it here, but there may be a late decision.

Mr. Kaufmann: I haven't given any numbers to mine at all. I just dumped them on your desk.

Mr. Miller: The plaintiff excepts to the refusal of the Court to give his separate motion for a directed verdict as against defendant, St. Joseph Fuel Oil and Manufacturing Company, and ask it be marked as Plaintiff's Instruction 1.

The plaintiff excepts to the refusal of the Court to give the separate motion of plaintiff for a directed verdict as against the defendants, Claude Stevenson and Harvey Hoyt, and marked Plaintiff's Instruction 2.

The plaintiff excepts to the refusal of the Court to give Plaintiff's Instruction Number 3.

The plaintiff excepts to the refusal of the Court to give plaintiff's requested Instruction Number 4.

The plaintiff excepts to the refusal of the Court to give its Instruction Number 5.

The plaintiff excepts to the refusal of the Court to give plaintiff's requested Instruction Number 6.

The plaintiff excepts to the refusal of the Court to give plaintiff's requested Instruction Number 7.

The plaintiff excepts to the refusal of the Court to give plaintiff's requested Instruction Number 8.

The plaintiff excepts to the refusal of the Court to give plaintiff's requested Instruction Number 9.

The plaintiff excepts to the refusal of the Court to give plaintiff's requested Instruction Number 10.

(Which said Plaintiff's Instructions 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, so offered by the plaintiff and refused by the Court, over the exceptions of the plaintiff, are in words and figures as follows:)"

Then follows set out in full the ten (10) separate requests of petitioner, with the word refused at the bottom written by the judge (R. 145).

What Trial Judge Said As to Refused Requests.

The petitioner in due time filed (R. 153) his motion for new trial asserting error in refusing each of petitioner's ten (10) requests, further asserting error in the judge's oral charge stating specifically wherein the charge was in error. In passing upon the motion for new trial the trial judge in his "Memorandum and Order" (R. 157) said in part:

"Plaintiff has filed a motion for new trial, alleging as error the court's refusal to give certain instructions asked by the plaintiff and presented to the court prior to its charge to the jury. *The questions of law submitted by plaintiff in those instructions were fully considered by the court prior to the charge to the jury*" (Italics ours).

The Court of Appeals on this record refused to consider at all the refusal of the petitioner's Nos. 3 to 10, inclusive, of the said requests or the admitted errors in the oral charge of the judge to the jury for the reasons above set forth.

Questions Presented.

A.

Has the Federal Court of Appeals on the record made properly construed Rules 51 and 46 of the Federal Rules of Civil Procedure in refusing to consider or review at all the action of the trial judge in the refusal of petitioner's Nos. 3 to 10, inclusive, separate requests? (R. 147 to 151.)

B.

Where petitioner at the close of all the evidence tendered to the trial judge ten written separate requests (R. 145) covering the law of the case as he conceived it to be and the trial judge with the requests before him on the bench then orally charges the jury, and then writes on each of the requests at the bottom "refused" and gives them to the clerk for filing allowing petitioner exceptions thereto, and in fact informs counsel for both sides how their exceptions may be saved by stating in part (R. 144) "*you may say the Court erred in refusing to give instructions so and so, or erred in giving instructions asked by the* plaintiff," and such course was followed, and the trial judge said in overruling the motions for new trial (R. 157), "The questions of law submitted by plaintiff *in those instructions were fully considered by the Court prior to the charge to the jury,*" was such not sufficient for the petitioner to be entitled to a review of the remaining eight of the requests by the Court of Appeals as to error claimed in their refusal by the trial judge under Rules 51 and 46 of the Rules of Civil Procedure?

C.

Where the trial judge in seven instances designates the wrong party in charging the jury (R. 134 to 142) and the Court of Appeals holds the confusion caused thereby could not be permitted to stand without correction, and appellees direct the Court's attention to the confusion and the judge attempts to correct, but as petitioner contends did not remove the confusion, may petitioner be held to have accepted the alleged clarification (R. 151) of the original charge as sufficient because petitioner made no objection or the exception was too broad? And is the ruling that the alleged clarification was sufficient right? And when the jury requests clarification and the judge attempts clarification and the exception thereto is no broader than the clarification is not the exception sufficient to entitle review? (R. 152.)

SPECIFICATION OF ERROR.

The Court of Appeals erred:

(1) In holding on the record made as heretofore set forth that petitioner under Rules 51 and 46, of the Federal Rules of Civil Procedure was not entitled to consideration of whether the trial judge committed error prejudicial to petitioner in refusing the remaining eight of the ten separate requests, being Nos. 3 to 10, inclusive, having considered the first two being peremptory on the question of negligence of defendants.

(2) In holding on the record made that petitioner was not entitled to a review by the Court of Appeals of the refusal by the trial judge of eight of the ten separate written requests.

(3) In holding after admitting the errors in the oral charge of the trial judge in designating in seven instances

the wrong party, that the same was later properly corrected at the suggestion of appellees (R. 173) and that Petitioner must be held to have accepted the alleged clarification, in the absence of objection, and in further holding that in the absence of objection the clarification "met the test" required, and in still further holding when the jury requested further clarification by asking if "both parties be found to be negligent is it possible to return a damage in favor of plaintiff?" (R. 151, 152), that petitioner's objection because too general "presents nothing for review" (R. 174).

(4) Because the holding of the Court of Appeals denying to petitioner a right of review of the refusal by the trial judge in refusing eight of the ten requests of petitioner and that the seven admitted errors in the oral charge of the judge were properly clarified in the absence of objection or objection too general are in conflict with rulings of other Courts of Appeals on the same matter or has decided an important question of Federal law which has not been or should be settled by this Court, or has decided a Federal question in conflict with applicable decisions of this Court, or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision.

REASONS FOR GRANTING THE WRIT.

I.

In refusing to consider or review the refusal of the trial judge of petitioner's 8 of the 10 separate written requests (R. 147, 150), **the Court of Appeals (1) improperly construed Rule 51 of the Federal Rules of Civil Procedure, with respect to alleged failure of sufficient objections or exceptions** (R. 175), **and (2) erroneously denied petitioner on the record made a consideration or review of the error of the trial judge in refusing said requests, and (3) erroneously held that admitted errors in the oral charge were sufficiently afterwards clarified by the judge, in the absence of no objection or objection too general** (R. 174), **and (4) erroneously held that the objection was too general covering a clarification requested by the jury.**

It will be noted in the Court of Appeals opinion (R. 175) that the Court only mentioned the first objection made by petitioner and makes no mention of the exceptions taken and allowed by the trial judge to his refusal of petitioner's 8 of the 10 written requests, which were taken at the trial judge's suggestion (R. 144). It should also be kept in mind that when overruling the motion for new trial the trial judge said he (R. 157) "had fully considered" the requests "prior to the charge to the jury," which makes a record showing the same were called to the trial judge's attention, which is the foundation or reasons for objections or exceptions. Mr. Garvey of counsel for respondents said to counsel for petitioner at the time, "I believe you saved your exceptions" (R. 144). All understood the reasons for the exceptions. We thought the Court had inadvertently overlooked the objections or exceptions, but as the Court overruled the petition for re-

hearing without opinion it appears not (R. 193). The Court of Appeals was bound by what the whole record indisputably shows, and the question is was the record sufficient to entitle petitioner to a consideration or review of the trial Court's refusal of his said requests.

Construction of Rule 51.

First, we assert that petitioner complied with Rule 51, with respect to filing with the trial Court petitioner's "*written requests.*" The first sentence of this rule provides for such. The second sentence requires the Court to inform counsel of its proposed action on the "*requests*" before the "arguments" and that the Court shall instruct the jury after the arguments. Now when the Court refuses the requests as the trial judge did, then exceptions taken to the action of the Court were allowable and taken as required, and in this connection Rule 46 entitled "exceptions unnecessary," which says "Formal exceptions to rulings or orders of the Court are unnecessary" should be considered as the Court ruled in an opinion by the eminent Judge Learned Hand in *Wright* v. *Farm Journal, Inc., et al.*, (2 C. A.) 158 F. 2d 976, 978, and *Sweeney* v. *United Feature Syndicate,* (2 C. A.) 129 F. 2d 904.

At the time of the oral charge of the trial judge these refused requests lay on the bench before the judge and spoke for themselves, and the trial judge admitted in his memorandum overruling the motion for new trial he had "*fully considered the requests prior*" (R. 157) to making his oral charge, which means that the judge had rejected the requests because not the law. Such shows not only the rejection by the trial judge but the record shows the judge suggested the *form of the objections or exceptions as sufficient* for the Court and having satisfied the trial judge, what merit is there to the Court of Appeals' con-

tention that on the point it makes that more specific objections or exceptions should have been made to the trial judge in that they should point out the conflict between the oral charge and the refused requests. When the trial judge had ruled the requests not the law and exceptions taken to the refusal, why should petitioner be required to go further and specifically point out wherein the oral charge differed from the refused requests? What is the sense of such?

Must the objections or exceptions point out to the judge why the requests are the law of the case and the point of conflict between the oral charge and the requests? Do not the requests and oral charge speak for themselves? Did the trial judge not know the conflict and the points of law set forth in the refused requests which were not declared and refused in his oral charge to the jury? He should, and why should this be required of the party's lawyer, who may assume the judge knows what he is doing? We submit the record made shows compliance with Rule 51 with respect to the requests.

Second, in the next and third sentence of Rule 51, it is stated that no party may assign error as to the giving or the failure to give an *"instruction"* unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection. In the first two sentences of the rule "written requests" are referred to and involved while in the third sentence only "an instruction" is referred to and involved. We urge the use of the words *"requests" and "instruction"* is significant and used advisedly, and that the third sentence means and refers to only the oral charge of the judge and not to written requests. Otherwise, why does the rule in the first instance use the word "requests" and then in the third sentence use the word

"instruction"? However, in any event there is nothing in the rule requiring the objection or exception to specifically point out the points of conflict between the Court's charge and the law as stated in appellant's requests. Such is something the Court of Appeals is writing into the rule that is not there.

In this case the trial judge says he "fully considered" the requests which was his duty and prerogative as judge, and being "fully considered" he refused them and was satisfied with the exceptions. The trial judge knew what his charge was, and he knew what the requests were which lay on the bench before him for he says and admits he had "fully considered" them and refused them. He did not request counsel to point out the points of conflict between the requests and his oral charge. Would he not already know and particularly so when he admits he had "fully considered" them and refused them? Is petitioner required to point out what the judge already knows after a full consideration of the requests? Would the trial judge have refused the requests and allowed exceptions if he had not considered there were conflicts between the requests and his oral charge? We think not. We submit the Court of Appeals has misconstrued and misinterpreted Rule 51 on the record as made in this case.

Third, the seven admitted errors in the oral charge of the judge in seven times designating the wrong party, being bound to cause great confusion to the jury, were not sufficiently corrected or clarified. The Court of Appeals in the first attempt of the trial judge to correct these seven errors held that petitioner accepted the clarification and waived such in the absence of objection. Such holding we urge is not proper under Rules 51 or 46, or the law, and in conflict therewith (R. 173). It is the law that when a correction is made in a charge to the jury such

must be done "in clear and unmistakable terms," and "must leave no doubt in the minds of the jury," and must as this Court held in *McCandliss* v. *U. S.*, 298 U. S. 342, 347, 56 S. Ct. 764, 766, "affirmatively appear from the whole record that the error was not prejudicial." Cf. *Baer Bros.* v. *Palmer et al.*, (10 C. A.) 158 F. 2d 278, 280, 281; *Louisville and N. R. Co.* v. *Johnson,* (C. A. 7) 81 Fed. 679, 681; *Puget Sound Nav. Co.* v. *Nelson,* (C. A. 9) 59 F. 2d 697, 700. We think the form of charging a jury in the Federal Courts should also be kept in mind, in that the jury do not take the charge in writing with them to the jury room, as in our state court where they may read and discuss it, but must trust to memory, which all the more requires that there should not be confusion.

To "soften" the rigor of its holding the Court of Appeals mentions that petitioner's degree of care was stated more favorably than required, which we deny, but even so one error may not be offset by another. But the Court it appears did consider the alleged correction or clarification (R. 174) in connection with and considering no objection made saying "We think the Court in his effort to correct the orginal instruction met the test of this case." Here we call attention to this Court's ruling in the *O'Donnell case, post,* where this Court did consider upon the premise that the Court of Appeals had considered, but erroneously. The ruling of the Court of Appeals was wrong and is in conflict with the ruling of this Court and the respective Courts of Appeals in the above cases in the immediate preceding paragraph.

Further when error is admitted and an attempt is made by the judge to correct it, such previous admitted error is not prevented of review because of no objections, and as to whether it was corrected or more confusion resulted, cannot under the law avoid review because of the

lack of objections or objection too general when the purpose of an objection or exception is considered and the judge already knows the points of contention as in the case at bar. It seems to us the Court of Appeals has erroneously struggled too hard with technicality to avoid review of the merits.

And again when the jury was in trouble as to the meaning of the judge's charge with respect to whether petitioner could recover if both parties were found negligent (R. 151, 152) we were again met with technicality against review because petitioner's objection was allegedly too broad to present anything for review (R. 174). Certainly the reply or answer of the trial judge to the question of the jury was too general on what at the least was a most important point in the case, and petitioner's objection was not a "general objection" or not specific enough to reach or point out the error of the answer made by the judge, and the refusal of the Court to *consider it* on review is an erroneous holding under the cases cited by the Court and Rule 51, and in conflict with the settled law.

Conflict with Other Courts of Appeals.

The Court of Appeals ruling we urge is in conflict with the recent opinion of this Court in *O'Donnell* v. *Elgin, J. & E. Ry. Co.*, 338 U. S. 384, 70 S. Ct., pages 200, 206, in which this Court granted certiorari on the Seventh U. S. Court of Appeals, 171 F. 2d 937, 976, and reversed the Court of Appeals as to a holding that the exceptions were insufficient to warrant review of certain requests of law urged by the plaintiff, this Court rather casting aside the technical holding of the Court of Appeals and went direct to the merits of the exception saying at page 206:

> "Criticism is made that petitioner's requests to charge were not sufficiently specific. That they were

somewhat general in statement and were cast in terms of a negligence case is true. But the Court of Appeals found these requests sufficiently specific and pertinent to the issues to present the question which it decided, and in deciding this question the way it did, we believe it has fallen into error. We make no examination of the charge insofar as it related to the issue of general negligence." Reversed.

In the case at bar the trial judge admits and says he "fully considered" petitioner's separate requests and must have been satisfied with the exceptions for which he pointed the way. Does not the O'Donnell case then in the light of the record in the case at bar disapprove the viewpoint and holding of the Court of Appeals?

In *Cal-Bay Corporation et al.* v. *United States,* (C. A. 9) 169 F. 2d 15, 19, the Court held in an identical situation contrary to the Court of Appeals in the case at bar, that such an exception as in the case at bar was sufficient, the Court of Appeals for the Ninth Circuit at page 18, saying:

> "In this situation appellants requested an instruction that, in the determination of the value of gas and oil leases, it may be based on the reasonable possibility of production in paying quantities, even though there were not a reasonable probability shown of such value.
>
> Due exception to the denial of this requested instruction was made and the prejudicial effect of this claimed error was strongly argued here. It was made a section of appellants' brief entitled '6. The Court erred in refusing appellants' requested instructions on market value,' in which it was said of the refusal to give this requested instruction 40 and two others that 'Each was designed to correctly inform the jury that market value could be based on reasonable possibilities or speculative elements. The jury was told the contrary. Therefore, the refusal of each of these instructions was prejudicial error.'

> (5, 6) There is thus no merit to the statement that appellants 'made no claim either here or below that (the requested instruction) was negatived by any charge actually given.' *Nor is there merit in the novel contention that the excepted refusal to give a proper and needed instruction becomes valueless if there is no exception taken to a differing and erroneous instruction.*
>
> We think the district court erred in refusing such an instruction" (Italics ours).

Can there be any doubt of the conflict? We think not. In the above case there was no negative exception taken to the oral charge or other instructions and the court wisely and righteously held such was not necessary. Should this Court not settle which is right so lawyers may know the proper procedure on so important a matter of procedure occurring almost daily just as this Court did with respect to Rules 26, 33, 34, 35, pertaining to discovery in *Taylor* v. *Hickman,* 329 U. S. 495, 67 S. Ct. 385, about which there was conflict in the different U. S. Courts of Appeals?

In *Good Holding Co.* v. *Boswell,* (C. A. 5) 173 F. 2d 395, no exceptions were taken to the oral charge of the trial judge, but the Court of Appeals as to the written requests refused by the trial Court considered the written requests (which is in direct conflict with the Court of Appeals in the case at bar) saying at page 401:

> "As for the written charges requested and refused by the court, a careful consideration of each of them discloses that every relevant and legal charge requested was substantially covered in the court's oral charge. The issues were all properly submitted, and we find no prejudicial error in either the oral charges given or the requested charges refused." Citing cases.

In *Allen* v. *First National Bank,* (C. A. 5) 169 F. 2d 221, 225, no exceptions were taken to the general charge of the Court, but the Court considered the refused requests asked by the defendant, the Court at page 225, saying:

> "When we come to the refusal of the instructions asked by the defendant to determine whether there was reversible error, in refusing them it must be kept in mind that the requests may not be considered as abstractions. They must be considered in the light of the whole record, including the general charge to which no exception was taken, and in the light of the statute governing hearings on appeal."

In *Drohan* v. *Standard Oil Co.,* (C. A. 7) 168 F. 2d 761, 764, the Court considered refused requests (contrary to what the Court of Appeals refused to do in the case at bar) at page 764, saying:

> "We now consider the contention that the court erred in refusing to charge the jury as requested by Nichols and defendant. * * * All that need be said is, that we have read the refused instructions as well as the instructions given by the court covering these questions. The given instructions properly and fully announced the correct propositions of law applicable to the case; hence no error was committed in refusing to give the tendered instructions." Citing cases.

In *S. S. Kresge Co.* v. *Holland,* (C. A. 6) 158 Fed. 495, 499, the Court considered the refused requests of the defendant (contrary to what the Court of Appeals refused to do in the case at bar) at page 499, saying:

> "Following Rule 51, of the Rules of Civil Procedure, appellant submitted to the court six requests for instructions, all of which were denied. It is admitted that Requests Nos. 1, 2 and 3, were covered in the general charge. Request No. 4, was as follows

> * * * This request was properly denied because the effect of it was to relieve the appellant of negligence if it did not know that its floor dressing had qualities which would make it dangerous * * * In so far as Requests Nos. 5 and 6, correctly stated the law, these were sufficiently given in the general instructions."

In *Lemley* v. *Christophersen,* (C. A. 5) 150 F. 2d 291, 292, the facts were the trial judge stated "either side might have an exception" to the charge as given, and the record "shows no specific objection" made at the time, yet the Court considered the refusal by the trial Court of two requests "because the appellee's brief concedes that the refusal to charge the two requests made by appellant occurred," which is contrary to what the Court of Appeals in the case at bar refused to do.

In *Home Ins. Co.* v. *Tydal Co.,* (C. A. 5) 152 F. 2d 309, 310, the Court considered written requests when the objections to the Court's charge was held to be too general.

In *Sweeney* v. *United Feature Syndicate,* (C. A. 2) 129 F. 2d 904, the eminent Judge Learned Hand writing the opinion considered a request to charge being No. 12, when no exception had been made according to the record, said:

> "Here it appears that there was full discussion of the point raised which adequately informed the court as to what plaintiff contended was the law, and the entry of a formal exception after that would have been a mere technicality. Cf. *Stoltz* v. *United States,* (Ninth Circuit) 99 F. 2d 283, 284. Those cases construing Rule No. 51, F. R. C. P., strictly all involve situations where no indication was given to the judge that error would be assigned to his ruling."

Is not the ruling of Judge Hand above in conflict with the ruling of the Court of Appeals in refusing to consider

the requests of petitioner in the case at bar? What is the effect of the trial judge saying he fully considered the refused requests? Is such not an admission that the points of law, as declared in the requests, were fully understood by the judge? Why did he refuse the requests and grant the exceptions? And again is not the ruling of the Court of Appeals not in conflict with the following Wright case by the same Court?

In *Wright* v. *Farm Journal, Inc.*, (C. A. 2) 158 F. 2d 976, 978, the Court said:

> "The request for a further instruction was in essence equivalent to an objection to the charge, which had left to the jury the question as formulated by the judge whether the words, 'used in the article were or were not libelous.' Under Federal Rules of Civil Procedure, Rule 46, 28 U. S. C. A., following Section 723c: 'Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; * * *.' *So far as Rule 51 requiring written requests to be submitted at the close of the evidence might have any pertinency to the case at bar it must be construed in the light of Rule 46. Williams* v. *Powers,* (6 Cir.) 135 F. 2d 153, 156" (Italics ours).

The case of *Williams* v. *Powers,* (6 C. A.) 135 F. 2d 153, 156, cited in the *Wright case, supra,* is almost like the case at bar except in the case at bar exceptions were taken as suggested by the trial judge while in the Williams case no objection or exception was taken to the refused requests, the case, an automobile collision case occurring on highway, as in the case at bar, was reversed and

remanded for new trial, the Court considering the refused requests and the oral charge of the judge to which "appellant made no objection," saying Rule 51 should be read in connection with Rule 46. This case is certainly in conflict with the ruling in the case at bar of the Court of Appeals that the refusal of the requests could not be *considered because the exceptions did not specifically point out "the points of conflict between the Court's charge and the law as stated in appellant's requests."* In the *Williams case* the court said at page 156:

> "Rule 51 should be read in conjunction with Rule 46. The purpose of these rules is to inform the trial judge of possible errors, that he may have an opportunity to consider his rulings and if necessary to correct them, and where it appears in the record that the point urged on appeal was called to the attention of the trial court in such manner as to clearly advise it as to the question of law involved, that is sufficient. *Sweeney* v. *United Features Syndicate,* (2 Cir.) 129 F. 2d 904; *Hall* v. *Aetna Life Insurance Company,* (8 Cir.) 85 F. 2d 447, 451. In our opinion we should consider the objection of appellant to the instruction given."

The statement of the Court of Appeals that Rule 51 "is but a statement of what Federal Courts have said prior to the adoption of the rules" is not an accurate statement. We are now dealing with new rules that should be uniform as to meaning in all Federal Courts. Such, we believe, was one of the reasons for the rules so that the bench and bar might know them with uniformity in all circuits, and thus simplify the practice and make easier the procedure in the administration of justice, and avoidance of technicality. The rule as heretofore analyzed by us we urge is as the two requirements of the rule show, which was the reason for the new rule. The principal

cases cited in the opinion (R. 175) were decided before Rule 51 was made. The case of *Palmer* v. *Hoffman* cited and decided by this Court does not cite Rule 51, nor does this case encompass such record facts as in the case at bar, and we believe is not in point on the record. The case at bar is more like the recent case decided December 12, 1949, of *O'Donnell* v. *Elgin, J. & E. Ry. Co.*, 338 U. S. 384, 70 S. Ct. 200, 206, where this Court granted certiorari and went to the merits as did Judge Learned Hand in the *Sweeney* and *Wright cases, supra,* referring in the Sweeney case to the Ninth Circuit case of *Stoltz* v. *U. S.*, 99 F. 2d 283, 284, citing Section 269 of the Judicial Code as amended 28 U. S. C. A. 391, to the effect that the failure to except which does not affect the substantive rights of the parties should not prevent deciding the cause on the merits. Cf. *Jackson County* v. *Alton R. Co.*, (8 C. A.) 105 F. 2d 633, 638, 639.

The Refused 8 Requests Nos. 3 to 10, Inclusive, Properly Declared the Law of the Case and Should Have Been Given (R. 147, 149).

It may not be necessary at this time to point out the merits of the refused requests, which refusal prevented a fair trial under the law to petitioner but we shall point out some of the high points pertaining thereto.

As previously stated refused requests Nos. 6 and 7 (R. 149) are illustrative of two high points in this connection. Request No. 6 reads as follows:

> "The Court instructs the jury that even should they believe from the evidence the brakes on the tractor and trailer were defective and 'went out' and would not operate as brakes on the tractor or trailer, at the time in question, yet if you further believe such was directly due to lack of reasonable inspection or

failure to exercise reasonable care to have and keep the brakes in a reasonable workable condition for the purpose intended, then such constituted negligence on the part of the defendant owners of the tractor and trailer and the failure, if any, of the brakes to operate for the purpose intended constitutes no defense in this case for the defendant owners of the tractor and trailer."

Such is the settled law of Missouri as held in an automobile collision case of *Shaw* v. *Fulkerson*, 339 Mo. 310, 96 S. W. 2d 495, 498. See also, *Hall* v. *Frisco R. R.*, (Mo. Sup.) 240 S. W. 175, 177. Such governed this case and is universally the settled law, but was not declared as the law in the oral charge of the trial judge. On the contrary the trial judge's confusing charge never mentioned or referred to the point of law referred to in refused request No. 6. All he said on the question of brakes was (R. 139), "It is the contention of the defendants that their conduct in that respect was the result of the failure of the brakes to hold" * * * and then again (R. 140), "In this case it is contended by the defendant that he was not negligent because of the condition of the brakes. It is for you to determine whether or not the brakes did fail to hold or whether, if they did not hold, the driver was negligent in the operation of the car thereafter."

It is thus seen the trial judge nowhere in his oral charge informed the jury that the failure of the brakes to work or operate would not constitute a defense if the failure was directly due to negligence of the defendant owners to keep the brakes in reasonable workable condition, of which there was no evidence at all by the defendants, further than that of the driver Hoyt that the brakes "worked perfect until I started down the hill there at Smithville (R. 83)," who admitted on cross-examination that "it was a most unusual and extraordinary thing (R.

113) for brakes in this condition to go out" and there was no evidence at all as to what caused the brakes to not work or "go out."

Brakes may work perfectly up until they give away and inspection is necessary to keep them in condition for we know they will not last forever and will wear under strain and give way, especially under heavy load as of a heavy oil transport weighing 20 tons. Safety of the public requires such. There was no evidence of inspection of the brakes. It was prejudicial error to refuse Request No. 6. Certainly an oil transport cannot avoid liability by saying my brakes refused to work when on account of such he pulls over onto another's lane of travel and collides with the automobile of the traveler as here in his own lane.

The next high point is the refusal of request No. 7, which is as follows:

> "The Court instructs the jury that the claim of defendants that plaintiff was guilty of negligence is an affirmative defense on the part of defendants and that the burden of proof is on the defendants to prove by a preponderance of the evidence such claim of negligence, and the Court further instructs you that if the defendants have not done so then you must find in favor of the plaintiff on this issue."

The trial judge referred in his oral charge to the burden of proof of contributory negligence once as follows (R. 138):

> "It is the duty of defendants to prove by the preponderance or greater weight of the evidence that the defendant was guilty of 'contributory negligence.'"

Not only was this reference never corrected by the trial judge, but even had it been corrected to read plaintiff

instead of defendant in the last line it would still not be a proper charge for it nowhere uses the words "burden of proof" or tells the jury such is an affirmative defense, and if the defendants have not established such burden of proof, then the jury must find in favor of the plaintiff on this issue. Request No. 7, was a clear perfect request on an issue which involved asserted contributory negligence (R. 151).

Refused requests Nos. 3, 4, and 5, were proper requests and proceeded on the theory of no emergency excusing the defendant owners without proof of inspection, etc., of the brakes as above asserted in refused request No. 6, or in other words defendants could not claim the benefits of an emergency without proof such emergency was not the result of negligence on their part, and no place in the judge's oral charge was such ever so declared to the jury which was one of the essential high points necessary to defendants' defense. We do not believe anyone may read the oral charge and reach the conclusion Petitioner and plaintiff, an honest farmer, had a fair trial of his suit for the death of his wife and serious injuries to himself. We hope this High Court, busy as it is, will find time to read the record and see what actually occurred as to the merits, the result of which, we believe, reflects on the administration of justice.

Urgent Need for Certiorari.

We urge a reference to the cases cited above of other U. S. Courts of Appeals will disclose that the Eighth Circuit Court of Appeals has in refusing to consider the errors of the trial judge in refusing the above requests on the record made and the erroneously holding that the admitted errors in the judge's oral charge and the clarification at the request of the jury, were sufficiently

afterwards, clarified by the judge in the absence of no objection or objection too general, has rendered a decision in conflict with the decisions of other U. S. Courts of Appeals, and has so far departed from the accepted and usual course of judicial proceedings of other Courts of Appeals and this Court, and has so misinterpreted Rule 51 that this Court, since so far as we can find has not construed this rule, that it should grant certiorari and settle the conflict and establish a procedure on an important matter of procedure that will be uniform and just in all Federal Courts.

Respectfully submitted,

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Dated Sept. 1st, 1950.

OCT 9 1950
CHARLES ELMORE GROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 291.

EMIL HANSEN, PETITIONER,

VS.

ST. JOSEPH FUEL OIL AND MANUFACTURING COMPANY, CLAUDE STEVENSON AND HARVEY HOYT, RESPONDENTS.

RESPONDENTS' SUGGESTIONS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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RESPONDENTS' SUGGESTIONS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

This Case Does Not Fall Within the Class of Reviewable Cases Mentioned in Rule 38.

Jurisdiction of this court is invoked under Title 28, U. S. C., Sections 1254 and 2101 (C) of the New Judicial Code, effective September 1, 1948, and is subject to Rule 38 of this court applying to review on writ of certiorari of decisions of circuit courts of appeal.

A. The case is a damage suit governed by Missouri law, filed and tried in Federal District Court only because of diversity of citizenship.

1. A Federal District Court jury decided for defendant.

2. The trial judge overruled motion for a new trial.

3. A three-judge court of appeals unanimously affirmed the verdict of the trial court.

4. Petitioner's motion for rehearing was overruled.

5. Certiorari if granted would result only in another appeal to a third court of a damage suit which would determine only the facts involved in this case.

B. In this case there is no decision:

1. Involving an important question of federal law which has not been or should be settled by this court.

2. Involving the decision of a federal question of any kind in conflict with applicable decisions of this court.

3. The decision is not in conflict with a decision of another court of appeal on the same matter.

4. There is no departure from the accepted and usual course of judicial proceedings and none has been sanctioned by either the district or the appellate court.

C. The only Federal question referred to by petitioner, the construction and application of Rule 51 of the Federal Rules of Civil Procedure by the appellate court is well decided by a long line of decisions; and the opinion of this appellate court

is in harmony with the established views of the Federal Courts.

D. Petitioner's cases which refer to or discuss the rule are in harmony with the decisions of this court, and in several instances rely upon cases cited by this appellate court in its opinion.

II.

Supplemental Statement.

Petitioner in his summary of the matter involved (petitioner's brief 2-3-4-24-25-26) offers a slightly prejudiced version of the facts not justified by the evidence nor as found by the Court of Appeals in its opinion.

Supplementing petitioner's summary of the matter, petitioner, then plaintiff, was driving on a straight, open highway where he could see for a quarter of a mile (168-169). Approaching him in the opposite direction was a truck loaded with fence posts referred to as the "Monteer truck," which in turn was followed by defendant's truck.

Defendant, following the Monteer truck down a hill, suddenly and for the first time found his brakes out of order (169) and turned over to the left side of the highway to avoid striking the rear of the Monteer truck (169-170). After so turning defendant then saw plaintiff's car approaching him about a thousand feet distant from him—blinked his lights at plaintiff as a signal (the accident occurring in broad daylight), and turning to the right and away from plaintiff as far as possible, crowded the Monteer truck over to the right until the Monteer truck which he was passing was completely off the highway to the right (170). Plaintiff's car, approaching defendant's truck, went over on an unusually wide dirt shoulder to plaintiff's right, but just as defendant's truck was crowding by the Monteer truck plaintiff suddenly turned back

to the highway immediately into defendant's truck and the collision occurred.

These are the recitation of facts in the opinion in the United States Court of Appeals (166-167-168-169-170) which are all justified by the transcript.

Plaintiff, although driving in broad daylight on an open highway with visibility for a quarter of a mile (168-169) not only did not know how long the defendant had been approaching him on his side of the highway but *never at any time even saw the Monteer truck which was admittedly also in front of him and directly approaching him* (59).

Respondents furnish this additional statement of the matter so that this court may understand why a jury found for respondents in the District Court, the District Court overruled petitioner's motion for a new trial in that court, the United States Court of Appeals found petitioner's motion for a directed verdict properly overruled; because from petitioner's statement of the matter this court might not readily understand why a jury, a trial judge and three appellate judges have all rejected petitioner's contentions.

SUMMARY.

Petitioner argues only two points in his request for certiorari (P. Brief, pp. 26-27)—One, that this court of appeals has misconstrued Federal Rule of Procedure 51 and in so doing is at variance with other courts of appeals; and second, that this court of appeals has departed from the accepted and usual course of judicial proceedings.

With regard to his first point:

There is no important question of federal law presented which has not been settled or should be settled by

this court, and the opinion of the United States Court of Appeals is in harmony with other courts of appeal and this court.

The Court of Appeals in construing Federal Rules 46 and 51 has followed a large line of decisions both before and after the adoption of Rule 51 which are in the interests of substantial justice and which militate against "ambushing the trial court" and alleged error by a "rule of afterthought."

No new federal matter is being presented to the court and if certiorari is granted, the opinion of this court would only give a third hearing to the facts of this particular case.

None of petitioner's cases show a conflict with the opinion of the Court of Appeals in this case. Only three of them construe Rule 51 and all these decisions are in harmony with the decision in this case.

Petitioner, although contending that the Court of Appeals has so far departed from the accepted course of judicial proceedings, offers nothing in support of this point which we take to be an elaboration or a restatement in different form of his first point.

This is therefore merely another appeal of a Missouri damage suit based on state law which has already had two hearings.

ARGUMENT.

The Court's Charge.

The Court of Appeals in its opinion properly construed Rules 46 and 51 and its opinion in that respect is not in conflict with rulings of other courts of appeals on the same matter.

The situation concerning which petitioner complains is as follows: Petitioner submitted to the trial court ten written instructions, two of which were requests for directed verdicts, one of which was a form of verdict and the remaining seven were statements of plaintiff's view of the law. The court then delivered his general oral charge to the jury. (We shall refer later to the matter of the court's correction of his charge.)

The court's charge incorporated all of the proper statements of law sought by plaintiff in his requests and admittedly, even from petitioner's standpoint incorporated many of the statements requested by the petitioner.

For example, Instruction No. 8 was on the issue of a witness swearing falsely (149), admittedly covered by the court's charge (141). In other elements of the requested instructions the court was asked by a portion of requested Instruction No. 4 (147-148) to instruct that defendants were to be held liable for the negligence, if any, of the driver of the tractor and trailer owned or controlled by defendants, fully covered by the court in his own language (136). The court admonished the jury as to the definitions of "ordinary care" and "highest care" and "highest degree of care" more fully even than covered by plaintiff's requested Instruction No. 9.

These allusions are illustrative of the fact that although not giving the instructions of the plaintiff in the specific language and words and style requested by him, the court in his charge (134-142) covered, whether or not in the style requested by plaintiff, every proper matter referred to by plaintiff in his requested instructions.

The trial court followed the established procedure in his handling of these requests.

As was stated by the court in *Terminal R. Assn. of St. Louis* v. *Staengel*, 122 F. 2d 271, l. c. 278:

> "* * * the court should be free up to the time of charging the jury to make the charge what he thinks it should be. It is not unusual, that the arguments themselves bring out matters which affect the charge to be given. Also it is established law that the court may refuse a requested instruction as a whole and then include a portion thereof in the charge."

Petitioner does not here complain that the trial court failed to inform counsel of his proposed action upon petitioner's request prior to counsel for petitioner's argument to the jury.

Petitioner does not complain that he was precluded from arguing to the jury any matter because of the trial court's action and that later the trial court did cover the matter in his general charge, and that counsel for petitioner was not informed in advance so that he might have an opportunity to argue the matter.

Plaintiff's Exceptions.

The only part of Rule 51 which is applicable to the situation involved is that portion which states:

> "*No party may assign as error the giving or the failure to give an instruction unless he objects thereto*

> *before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."*

Following the court's charge, petitioner, then plaintiff, made *only one specific objection* to the court's charge. He stated:

> "I also except to the reference of the court that in the death of Mrs. Hansen the jury may not consider loss of companionship" (142).

This was the only specific objection made by petitioner to the court's charge, in keeping with the mandate of Rule 51, and petitioner does not complain before this court and did not complain before the United States Court of Appeals of the trial court's ruling on that particular ruling.

Thus even from petitioner's standpoint, the trial court in his general charge had adopted much if not all of the matters tendered to the court in petitioner's requested instructions. The charge having been given, the trial judge as the record shows, then gave the parties an opportunity to object to his charge.

We limit our discussion at this time to petitioner's main contention regarding his requested instructions, and we discuss later the matter of the correction of the court's charge.

At this time after the court's general charge, with a situation that the trial court had from either party's version covered either all or much of the matters requested by petitioner, we have the following exceptions to the court's charge as shown in the record (142-3-4-5).

Petitioner made three objections to the court's charge, as shown by the record. They are as follows:

1. "May it please your Honor on behalf of the plaintiff I take it the court will allow us exceptions to such of the charges as we have heretofore requested of your Honor insofar as they are in conflict with what your charge has been to the jury."

2. "I also except to the reference of the court that in the death of Mrs. Hansen the jury may not consider loss of companionship."

3. "The petitioner, then plaintiff, made blanket exceptions to the refusal of the court to give all ten of his requested instructions as submitted" (144-5).

What then did the petitioner point out to the court in keeping with Rule 51 which requires him to state "distinctly the matter to which he objects and the grounds of his objection." He only made one specific objection to the court's charge—that is, to the court's telling the jury they might not consider loss of companionship with regard to the death of Mrs. Hansen, plaintiff's wife. His only other objection was the perfunctory filing of all of his ten instructions and his objection which we have numbered 1, that the court should allow him exceptions to the charges *"insofar as they are in conflict with what your charge has been to the jury."*

It is therefore clear why petitioner failed to have any objection to carry to an appellate court, as has been ruled time and again by the courts of appeal of this country, both before and after the passage of Rule 51.

Applicable Decisions Cited in Opinion.

The cases cited by the United States Court of Appeals in its opinion in this case support the declaration of law that petitioner with his "shotgun objection" failed to comply with what is required in Federal Court procedure.

The case of *Hall* v. *Aetna Life Insurance Company,* 85 F. 2d 457, cited by this court of appeals in its opinion, is typical of decisions before and after the adoption of the rule concerning this type of situation.

(This case of *Hall* v. *Aetna, supra,* is given as a supporting opinion in *Williams* v. *Powers,* 135 F. 2d 153, cited in petitioner's brief and from which he quotes copiously.)

The Court in *Hall* v. *Aetna,* in stating its views of a similar situation, stated:

> "And the exceptions taken should point out wherein the charge is erroneous or deficient and what requested instructions or portions thereof have not, either in words or in substance, been covered by the charge as given. This is only fair to the court and to opposing counsel."

The cases cited by the Court of Appeals in its opinion are in direct and exact support of its holding that petitioner offered nothing to the court to review. These cases, set out in the court's opinion (Transcript 174-5), are: *Detroit Edison Co.* v. *Stricker et al.,* (6 Cir.) 65 F. 2d 126, 127; *Hall* v. *Aetna Life Insurance Co.,* (8 Cir.) 85 F. 2d 447, 450; Rule 51, Federal Rules of Civil Procedure; *Beaver* v. *Taylor,* 93 U. S. 46, 55; *Sugar Refining Company* v. *Nassif,* (5 Cir.) 45 F. 2d 321, 326; *O'Connor* v. *Ludlam,* (2 Cir.) 92 Fed. 50, 54; *Palmer* v. *Hoffman,* 318 U. S. 109, 119; *Krug* v. *Mutual Benefit Health & Accident Ass'n,* (8 Cir.) 120 F. 2d 296, 301.

The statement found in the *O'Connor* v. *Ludlam case, supra,* l. c. 54, is typical:

> "In the federal courts the doctrine is firmly established that exceptions should be specifically taken so that the trial judge may have an opportunity to reconsider the matter and remove the ground of ex-

ception. Where the exceptions are not specified, an appellate court is under no duty laboriously to relate each of the requested instructions to the charge as given, in order to determine that no error was committed" (citing cases).

A Settled Question and Not One of First Impression.

Petitioner would contend that Rule 51 is a matter of new impression and he objects to the statement in this opinion (175) that Rule 51 "is but a statement of what Federal Courts have said prior to the adoption of the rules." Yet this is what every case cited by the opinion of the court of appeals holds, both prior and subsequent to the rule.

The United States Circuit Court of Appeals of the Second Circuit, in a very recent decision, *O'Connell* v. *Naess,* 176 F. 2d 138, l. c. 140, after quoting that portion of Rule 51 at issue herein states, "Indeed such was the law as stated by Mr. Justice Brandeis in *Fairmount Glass Works* v. *Cub Fork Coal Co.,* 287 U. S. 474, at page 486, 53 S. Ct. 252, 77 L. Ed. 439, before the Federal Rules of Civil Procedure were enacted."

This court in *Palmer* v. *Hoffman,* 318 U. S. 109, 87 L. Ed. 645, stated:

> "In fairness to the trial court and to the party, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where a part of the charge was correct, he may not through a general exception obtain a new trial" (Citing cases).

This court continued:

> "That long standing rule of Federal practice is as applicable in this type of case as in others."

In *Jack* v. *Craighead Rice Milling Co.*, 167 F. 2d 96, l. c. 103, the appeals court referred to a general objection to instruction and quoted that part of Rule 51 we have quoted, *supra*, and said:

> "The failure to particularize grounds of objection below so as to give the trial court an opportunity of correcting the instruction if erroneous and to advise opposing counsel, precludes review on appeal" (Citing cases).

Adding to the great mass of authority of this well-established question we find Moore's Federal Practice under the new Federal Rules, Vol. 3, 1949 Supplement, page 147:

> "The Crux of Rule 51 in this matter is: 'No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objections."

Following the statement is a mass of cases indicating uniformity and years of adherence to the spirit of this rule.

So as we demonstrate, the decisions cited by this court of appeals in its opinion before and after the adoption of the rule have both reiterated this as a long standing rule of Federal Procedure and have swept away the type of vague "shotgun" motion offered by petitioner in this case.

Trial Court's Statement.

Petitioner calls attention to the fact that the trial court in his memorandum passing on the motion for new trial stated as follows:

> "The questions of law submitted by plaintiff in those instructions were fully considered by the court prior to the charge to the jury."

Petitioner asserts that this statement relieved him of the necessity of making proper objections to the charge after it was delivered so as to entitle him to review on appeal.

All the trial court said was that he had given consideration to plaintiff's requests *prior to his charge.*

That is not the point at issue. The issue is: After the court had considered these instructions as he stated —after he embodied some or all of them in his charge— what did petitioner then do to call the court's attention, after the charge, that the charge had omitted or misstated any necessary elements presented in petitioner's requests?

That is the issue—What did petitioner do *after the charge* in which the trial court had considered his requests?

This is what he did: He excepted to "such of the charges as we have heretofore requested of your honor *insofar* (italics ours) as they are in conflict with what your charge has been to the jury."

This is the type of speculative "catch-all" objection consistently held by the courts to preserve nothing for review.

Petitioner's Cases Show No Conflict with This Opinion.

Petitioner does not cite any decision of any other court of appeals in conflict with the opinion of the court in this case.

Of all the cases cited by petitioner in his brief, only three cases refer to Rule 51 and discuss a contention as

to whether or not Rule 51 applies and whether or not the appellant complied with the rule. These cases are *Wright* v. *Farm Journal, Inc., et al.,* 158 F. 2d 976; *Sweeney* v. *United Feature Syndicate,* 129 F. 2d 904, and *Williams* v. *Powers,* 135 F. 2d 153. Respondent cannot find in any other case cited, a ruling by a Court of Appeals on the construction of Rules 51 or 46.

With regard to the three cases cited by petitioner in which this rule is discussed by a Court of Appeals, in the case of *Sweeney* v. *United Feature Syndicate, supra,* the court stated (l. c. 905-906):

> "The purpose of exceptions is to inform the trial judge of possible errors so that he may have an opportunity to reconsider his rulings, and if necessary correct them" * * *.
>
> "Here it appears that there was full discussion of the point raised which adequately informed the court as to what plaintiff contended was the law, and the entry of a formal exception after that would have been a mere technicality."

Thus, in the Sweeney case, admittedly there was a full discussion before the trial court on the particular error charged that the trial court had not complied with the party's request and admittedly the trial court was given an opportunity to correct the error complained of.

There is no resemblance to the situation in the Sweeney case and the situation in this case. The Sweeney case adequately complied with the spirit and purpose of Rule 51. In this case there was complete lack of compliance.

In *Wright* v. *Farm Journal, supra,* the issue was whether or not in that case the court had charged that anything stated of a person concerning his occupation or profession which injures him in his occupation or profession is libelous *per se.*

That court found that the party complied with Rule 51. From the opinion, l. c. 977, the request for the instruction was made after the charge of the trial court and the opinion states:

> "The court had already told the jury that truth would be a defense and the request must be read with that limitation which no one did or could dispute."

The Court of Appeals went on to say:

> "We think the court was sufficiently warned of the point of law which, if sound, went to the very heart of plaintiff's claim. The judge certainly did not avoid the issue by remarking as a ground for his refusal: 'I do not know whether the jury knows what "libelous *per se*" means.' "

So it may be seen in the Wright case that there were specific objections to the court's charge, a discussion between counsel and the trial court as to whether or not his charge had met plaintiff's request, a situation wholly different from petitioner's "shotgun barrage at the court's charge."

In *Williams* v. *Powers, supra,* the court discussed the application and construction of Rules 51 and 46, and the opinion reflects that the issue arose in this manner:

The appellee, who was the defendant, had filed with the court a written request that it charge the jury under Section 12603 of the General Code of Ohio, and in its charge the trial court had adopted appellee's request.

At the conclusion of the court's charge and before the jury retired, in response to an inquiry by the court to counsel appellant's counsel stated: "I desire an exception, however, to Section 12603 of the General Code."

The court interrupted counsel, saying he could make any further statement in the absence of the jury. The Court of Appeals in the *Williams case* discussed Rules 46 and 51 as follows, l. c. 156:

> "The purpose of these rules is to inform the trial judge of possible errors, that he might have an opportunity to consider his rulings and if necessary to correct them, and where it appears in the record that the point urged on appeal was called to the attention of the trial court in such manner as to clearly advise it as to the question of law involved, that is sufficient,"

citing the Sweeney case and *Hall* v. *Aetna Life Insurance Company*, 85 F. 2d 447, which is cited in the opinion complained of by petitioner.

These three cases cited by petitioner which are the only ones we find discussing and construing Rules 46 and 51, are directly consistent with the opinion in this case.

Rule 51 is in plain, unmistakable English. The three cases cited by petitioner which we have quoted show that in those cases the parties complied with what the rule required and wanted.

The facts in this case show that petitioner without any question, hair-splitting or technicalities, failed wholly to comply with the heart and spirit of the rule as well as its letter.

It is unnecessary to discuss many of the other cases cited by petitioner which do not attempt to construe Rules 46 and 51 and in which the points were not raised concerning the application of Rules 46 and 51. In many of the cases cited, the courts considered complaints of error, even though they stated the complaints were not properly raised.

In the *Lemley* v. *Christophersen* case, 150 F. 2d 291, cited by petitioner, the court stated with regard to appellant's contention, l. c. 292:

> "Appellee's brief concedes that the refusals to charge the two requests made by appellant occurred. We notice them for that reason only."

The case of *O'Donnell* v. *Elgin, Joliet & E. R. Co.*, 338 U. S. 384, 70 S. Ct. 200, 94 L. Ed. 170, cited by petitioner, involved a conflicting opinion regarding the safety appliance act and with regard to the criticism that petitioner's requests to charge were not sufficiently specific, merely stated, l. c. 176:

> "But the Court of Appeals found these requests sufficiently specific and pertinent to the issues to present the question which it decided."

In the O'Donnell case there was no discussion of compliance with Rule 51 or 46 and in this case neither the trial court nor the Court of Appeals found the requests sufficiently specific and pertinent to the issues to present the question which it decided.

The Court's Correction of Its Charge.

In its opinion (172) the court refers to the inadvertent transposition of the names of the parties "plaintiff" and "defendant." The opinion further (173) sets out the explicit, plain and categorical clarification which the trial court gave. The record shows that the trial court, in addition to asking if the clarification was clear to the members of the jury, in asking whether or not there was any confusion about it, added the sentence which is not quoted in the court's opinion, but appears in the transcript (151) "All right, I hope that is clear, so the record may be straight." The record then shows that the case was sub-

mitted to the jury and that petitioner's counsel sat silently by in the court room, apparently accepting the clarification as adequate and sufficient as stated by the court in its opinion (173). The case relied upon by the court in its opinion, the cases cited by respondent in its brief, such as *Keller* v. *Brooklyn Bus Corporation,* 128 F. 2d 510, and others, make it clear that the trial court did correct the confusion which, coupled with the total silence of the plaintiff and his entire failure to make any objection to the charge as corrected unmistakably upheld the court of appeals in its opinion on this issue.

As was stated in *Perley* v. *Roberts,* 138 F. 2d 518, l. c. 520:

> "The record does not indicate that she complied with Rule 51, Federal Rules of Procedure, by objecting to the charge before the jury retired, stating distinctly the matter therein to which she objected. Instead it distinctly appears that she permitted the jury to retire to consider its verdict without voicing any objection whatever to the charge as given."

Plaintiff also obtained a substantial benefit from the correction, for, as the appellate court pointed out in its opinion (173) the trial court in its correction erred substantially in favor of petitioner by telling the jury that plaintiff was liable only for "ordinary care" while the defendants were held to a duty of "the highest degree of care." See *Wininger* v. *Bennett et al.,* 104 S. W. 2d 413, in a case in some respects much like the facts in this case.

Petitioner would claim that the ruling of the court of appeals in the matter of the corrected charge in in conflict with the ruling of this court in the *O'Donnell case, supra,* and the following cases: *Baer Bros.* v. *Palmer et al.,* (10 C. A.) 158 F. 2d 278, 280, 281; *Louisville and N. R. Co.* v.

Johnson, (C. A. 7) 81 Fed. 679, 681; *Puget Sound Nav. Co.* v. *Nelson,* (C. A. 9) 59 F. 2d 697, 700.

There is no conflict between the opinion in this case and the cases cited by petitioner. In the Baer Brothers case the trial court made numerous errors in this charge and a later instruction of the court did not refer to these errors or make any attempt whatever to correct them. In this case the appellate court said, "It is obvious that the attempted curative instruction in no degree pointed out or corrected the errors complained of." In the Louisville & N. R. Co. case, there was no attempt by the court to correct a previous erroneous instruction. An erroneous statement was followed by a general instruction but no attempt was made by the trial court to refer to any instruction as having been incorrect with the intention to restate it or correct it.

In the *Puget Sound case* the court stated, l. c. 700:

> "But nowhere did the trial court specifically correct or repudiate the erroneous exposition of the rule as to the mandatory effect of the statute. Nowhere did he bid the jury expunge from their minds the erroneous statements and be guided only by the correct instruction."

Clarification at the Request of the Jury.

Petitioner makes several allusions to the request of the jury for clarification and his objection to the court's clarification in response to their request. Exactly what happened at that time is quoted by this court of appeals in its opinion (174). Following the court's clarification, petitioner made this objection:

> "The plaintiff excepts to that charge of the court for the reason that contributory negligence is not a defense in this case, and under the facts and evidence

> in evidence in this case, the case does not warrant submission of contributory negligence to the jury, and, further, the charge of the Court is too broad and not specific enough, too general. * * * It might be misleading and confusing" (152).

Petitioner's objection that contributory negligence was no element in this case was obviously an untenable one under the facts in this case and under Missouri law. The trial court was left with an objection by petitioner in this respect that this particular charge of the court was too broad, not specific enough, too general, etc.

The court of appeals very properly held in its opinion that this objection presented nothing for review by the appellate court (174) (Citing cases). Obviously this contention also presents nothing to this court as grounds for certiorari in this case.

CONCLUSION.

Respondents therefore respectfully submit that no Federal question is presented in this case which has not been or should be settled by this court; that no Federal law is involved; that the decision is not in conflict with the decision of another court of appeals on the same matter; that there is no departure from the accepted and usual course of judicial proceedings and the effect of granting certiorari in this case would be to merely give the petitioner another appeal and another opportunity to re-argue his suit for damages.

Most appropriate to this case are the remarks of Mr. Justice Frankfurter in *LeRoy Carter, petitioner,* v. *Atlanta & St. Andrews Bay Ry. Co.,* 94 L. Ed. 183, in which was said:

> "The argument at the bar of this court and the opinions dealing with the merits leave no room for doubt that no general principle is herein involved. There is merely a difference in the application of professedly settled rules under the circumstances in this particular case. Three experienced judges of the Court of Appeals have found no error in the judgment that was rendered for the defendant."

And as the comment further stated in substance, after a district court and a court of appeals have wrestled with plaintiff's case this court is asked to have another go at it. We respectfully suggest that neither Congress nor this court intended that all damage suits should be tried and their contentions adjudicated by three courts, including this court, burdened with the high responsibilities especially entrusted to it.

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Supreme Court of the United States

OCTOBER TERM, 1950.

No. 291.

EMIL HANSEN, PETITIONER,

VS.

ST. JOSEPH FUEL OIL AND MANUFACTURING COMPANY, CLAUDE STEVENSON AND HARVEY HOYT, RESPONDENTS.

PETITIONER'S REPLY TO RESPONDENTS' SUGGESTIONS.

I.

Where the Facts Invoke Rule 38 This Court Takes Jurisdiction.

The record shows respondents have, in addition to the three lawyers in the Courts below, a new lawyer in this Court, signing as attorney to argue no conflict in the Court of Appeals, the former three lawyers now appearing of counsel only. Such is significant of the seriousness to them of Petitioner's Application for Certiorari. This new attorney several times refers to our certiorari as "merely

another appeal of a Missouri damage suit," which it was intended this Court should not have jurisdiction, citing from the *Carter case, post,* a portion of a dissenting opinion of a learned member of this Court without designating that it is from a dissenting opinion. This is a damage suit for the death of petitioner's wife and serious injuries to petitioner and a most important one, at least to him, and he has a right to a fair trial according to the "law of the land" be he ever so humble. That he did not get as the record, we think, discloses, because the lower Courts misconstrued the law, and in doing so the Court of Appeals went contrary to the holdings of other Courts of Appeals as asserted in Petitioner's Petition for Certioriari.

This Court takes jurisdiction of damage suits when the proper facts appear for the invoking of Rule 38, the most recent cases being *Carter* v. *Railroad,* 338 U. S. 430, 70 S. Ct. 226, *O'Donnell* v. *Railroad,* 338 U. S. 384, 70 S. Ct. 200, and the last case of *Affolder* v. *Railroad,* 339 U. S. 101, 70 S. Ct. 509, which was certiorari on the 8 Court of Appeals, all being reversed. It ill behooves this attorney to refer to this case as "merely another appeal of a Missouri damage suit * * * which has already had two hearings" and below the dignity of this learned Court. So did the above three cases have "two hearings" below but notwithstanding a Court of Appeals in each case on certiorari was reversed. With these three cases the "wind" is taken out of the "sails" of his point.

II.

The Refusal of Petitioner's Written Requests by the Trial Court Were Entitled to Consideration on the Merits by the Court of Appeals.

It is also significant that the suggestions of the attorney fails to point out that the refused written requests

of petitioner, *which the Court of Appeals refused to consider*, did not properly or correctly declare the law applicable to this case, or that the oral charge of the Court declared the law as set forth in the refused written requests. They admit by their silence the requests properly and correctly declared the law but assert the oral charge "incorporates all the proper statements of law sought by petitioner's refused requests" *but such is not so as a reading of the oral charge of the trial judge will disclose as well as how inadequate and confusing it was and never once did it declare the law as set forth in the refused requests as pointed out in our reasons for certiorari.* They grasp only on "a witness swearing falsely" issue and stop with making mention only of a degree of care as to petitioner. They do not and dare not touch upon the real issues of law in our main requests, as disclosed by our petition for certiorari, and "trim" to mislead.

No "Shotgun" Exceptions.

Their suggestions refer to our exceptions as "shotgun objections" made with the view of "ambushing the trial Court." Such is not true. Our written requests were given to the trial judge, and he read them and refused them. They were short, specific and to the point. He allowed us exceptions and orally charged the jury otherwise. If such exceptions were "shotgun objections" then respondents' exceptions were also "shotgun objections" for they as the record shows pursued the same course with the sanction of the trial judge. They should not complain of a course they themselves pursued.

But such were not "shotgun objections," and could not be when they specifically set forth the applicable law of the case, and being refused the noting and granting of exceptions by the trial judge, was the serving of notice

another appeal of a Missouri damage suit," which it was intended this Court should not have jurisdiction, citing from the *Carter case, post,* a portion of a dissenting opinion of a learned member of this Court without designating that it is from a dissenting opinion. This is a damage suit for the death of petitioner's wife and serious injuries to petitioner and a most important one, at least to him, and he has a right to a fair trial according to the "law of the land" be he ever so humble. That he did not get as the record, we think, discloses, because the lower Courts misconstrued the law, and in doing so the Court of Appeals went contrary to the holdings of other Courts of Appeals as asserted in Petitioner's Petition for Certioriari.

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But such were not "shotgun objections," and could not be when they specifically set forth the applicable law of the case, and being refused the noting and granting of exceptions by the trial judge, was the serving of notice

that petitioner "does not acquiesce in the decision of the Court but will seek to procure its reversal, and that he means to save the benefit of his request or objection in some future proceeding" (Black's Law Dictionary, Third Ed., page 711, citing many cases). Certainly such could not constitute "ambushing." What more could a party do, except to repeat the substance of the requests which speak for themselves and which the judge had read and admits were fully considered? Such repetition would certainly be superfluous and a restating of something the judge already knew. *May anyone successfully assert that such a course of excepting to the trial judge's refusal of such written requests was not a calling of the trial judge's attention so as to advise the judge as to the question of law involved which has been held to be sufficient even without any exceptions under Rules 51 and 46 in the cases cited in our previous reasons for certiorari, the leading case being that written by the eminent judge Learned Hand?*

They omit to quote the first two sentences of Rule 51, pertaining to "a party filing written requests," which was the basis and authority for our written requests. Was such omission an endeavor to mislead this Court? The part omitted was new in the rule from any previous practice and specifically authorized the filing of such requests and *required the trial Court to rule on them and advise counsel of its "proposed" ruling "prior to the arguments to the jury."* Such was not at least the practice of District Courts in this circuit before the rule, and cases previous to the rule are, we urge, not in point. Rule 51, at least in this respect as to written requests authorized and started a new procedure.

The Refused Requests and Exceptions Called the Court's Attention to the Questions of Law Involved.

There is nothing in the rule requiring a party to "*direct the attention of the trial Court specifically to the alleged points of conflict between the Court's charge and the law as stated in appellant's requests*" as the 8th Court of Appeals held in the case at bar, which we have asserted is contrary to the holding of other Courts of Appeals in our reasons for certiorari under Rule 38 of this Court. Such seems to us to go too far and wrongfully assumes the trial judge may not be able to distinguish the elements in his oral charge from the written requests on the bench before him and which after fully considering he refuses. They mention that some of our cases do not specifically refer in the opinion to Rule 51, but all of the cases we cite were decided when Rule 51 and Rule 46 were in effect, and the Courts undoubtedly had them in mind. None of them go back to a time prior to these two rules. In addition to our exceptions to the refusal of the written requests were also, as additional exceptions, the conflict between our written requests and the oral charge of the trial judge, which by the requests showed the conflict which the trial judge was bound to know having refused the requests after fully considering them as to the applicable law of the case. Cases prior to Rules 51 and 46, such as cited by respondents of *O'Conner* v. *Ludham* and others, we urge are not in point, some of which are *Jack & Craighead* (8 Cir.) an unlike case on the point cited, but even in this case the Court did consider the refused requests, and *O'Connell* v. *Maess,* another unlike case involving the admission of evidence, and no refused requests under Rule 51, and the quotation is misleading. We stop here on this feature so as to avoid repetition of our original reasons for certiorari.

III.

The Trial Judge's Corrections of His Oral Charge Were Inadequate and Made the Charge More Confusing to a Lay Jury.

The Court of Appeals admitted in its opinion the oral charge of the trial judge required reversal, if not clarified. We have urged in our reasons for certiorari it was not clarified but made more confusing, and such holding of the Court of Appeals of proper clarification conflicts with the holding of other Courts of Appeals and this Court. Respondents cite the case of *Keller* v. *Brooklyn Bus Corp.*, 128 F. 2d 510, which involved much less error in the charge of the trial Court, and in that case, the able dissenting opinion of, His Honor, Judge Frank, is illuminating as to a jury trial before a jury of laymen. The quotation of respondents from *Perley* v. *Roberts* involved no refused requests as in the case at bar, and the jury were "permitted to retire to consider its verdict without voicing any objection whatever to the charge as given," and notwithstanding this the Court of Appeals did examine the charge and held the applicable law was accurately stated. We wonder why respondents quoted from this case such a misleading excerpt without giving the facts of the case and then finally urges as an answer that petitioner "secured substantial benefit from the correction because the trial Court erred by telling the jury that plaintiff was liable only for 'ordinary care,' while defendant was held to a duty of the highest degree of care."

The error of the oral charge was more than one of degree of care, and the correction meant nothing in this respect to the jury. Such shows how pressed respondents are in endeavoring to find something in the way of justification to sustain the alleged correction and charge, and is on a par with the unreal testimony of the truck driver that petitioner's automobile was 1,000 feet away when he turned out to pass the post truck ahead with his runaway transport, while petitioner testified that immediately after turning the transport into his lane of traffic the collision occurred. *However, such was at least a jury question and did not affect the error in refusing petitioner's written requests and the oral charge and alleged corrections. Petitioner was entitled to a submission on his theory supported by his evidence.* Such is also on a par with respondents' argument that "after a District Court and a Court of Appeals have wrestled with plaintiff's case this Court is asked to have another go at it," and "that neither Congress nor this Court intended that all damage suits should be tried and their contentions adjudicated by three Courts, including this Court." Such slighting remarks about a damage suit involving the death of a wife and serious injuries to petitioner should have no place in this case, and such argument is far afield from our grounds for certiorari under Rule 38 of this Court, and is characteristic of respondents' suggestions. This humble petitioner is spending his hard earned money which is no small sum in invoking Rule 38 of this Court, which was made by this Court for very advisable reasons, and so long as it is

the law, petitioner is entitled to his rights thereunder, and we believe will receive from this high Court full consideration on the merits of his Application for certiorari, and that this Court will not be influenced by the unjustifiable statement of the attorney for respondents, that this is "merely another appeal of a Missouri damage suit."

Respectfully submitted,

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Dated October 16, 1950.